No. 1372

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY, a (Corporation),

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, C. F. & J. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH CO., (a Corporation),

Appellees.

Appellee's Brief.

MACK & SHOUP and
GEO. S. GREEN,
Solicitors for Appellees.

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Appellees.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

On June 10, 1902, Miller and Lux, a California corporation, filed its bill of complaint against Thomas B. Rickey and many other persons, in the United States Circuit Court for Nevada, to obtain an injunction restraining defendants from diverting the waters of Walker River above complainants' lands to its prejudices.

Subpoenas were duly issued by said United States Circuit Court June 10th, 1902, and served upon Thomas B. Rickey and the other defendants. Thomas B. Rickey thereafter entered his appearance and filed his plea to the jurisdiction of the court, which plea was overruled. (Trans. p. 4; 127 Fed. 573). Thereupon the said Rickey filed his answer. (Trans. p. 4; 146 Fed. 574).

The other defendants entered their appearances and filed answers and cross complaints against Miller and Lux and also against Rickey and certain other co-defendants. Demurrers to the cross complaints or cross bills of the other defendants against Miller and Lux were sustained upon the ground that the matters were purely defensive in their nature and character and could be and were set up in the answers filed by them respectively, but the cross bill against co-defendants were held to be proper. (146 Fed. 577).

On August 6th, 1904, which was after the appearance and answer of the said Thomas B. Rickey in the case in the United States Circuit Court as aforesaid, said Thomas B. Rickey caused the Rickey Land and Cattle Company to be incorporated under the laws of the State of Nevada (Trans. p. 7), and conveyed to that Company the water right which he was claiming and which he was defending in the suit then pending in the United States Circuit Court (146 Fed. 584).

On October 15th, 1904, said Rickey Land and Cattle Company commenced two actions in the Superior Court in the County of Mono, State of California, against Miller and Lux, the appellees herein and a

large number of other persons (Trans. pgs. 8 and 9). Summons in the latter actions were issued and served upon the appellees herein, who appeared and filed demurrers to said actions upon the grounds:

(1). That the complaints did not state a cause of action.

(2). That the court did not have jurisdiction (Trans. pgs. 29 and 30).

On January 28th, 1905, while these demurrers were still pending in the Superior Court of Mono County, appellees herein filed a bill of complaint in the United States Circuit Court for Nevada, against the Rickey Land and Cattle Company, praying that such company be enjoined from prosecuting the suits brought by it in the California Court upon the ground that the issues therein involved were the same as those involved in the suit then pending in the United States Court.

It was further alleged that the subpoenas issued by the said United States Circuit Court upon said cross bills were served upon said Thomas B. Rickey on January 7, 1905, and prior to the time of the service of the summons upon appellees in the Mono County suits.

It was further alleged that the necessary effect of such actions in the Mono County Court was to bring for trial and determination the same issues involved in the said United States Circuit Court, so far as related to the issues between appellees and the said Thomas B. Rickey, and to obtain from said Superior

Court a judgment determining said issues in advance of the determination of the same by the United States Circuit Court and thereby defeat the jurisdiction of the latter court in the suit then pending before it and to hinder and embarrass that court in the trial of said issues and in the enforcement of any decree which that court may render in the suit then pending before it.

In the affidavit filed by Thomas B. Rickey, in response to the order to show cause why the Rickey Land and Cattle Company should not be restrained from prosecuting said suits in the said California Court, it was denied that the writs of subpoena upon appellants' cross bills were served prior to the service of the summons in the California case upon appellees, but, on the contrary, it was alleged that the summons issued out of the California Court were served upon the appellees therein before the subpoenas upon the latter's cross-bill had been served. (Trans. p. 50).

If the fact as to priority of service should be material, the presumption upon this appeal will be that the allegations of appellees as to the priority of service are correct, as upon this appeal all intendments are in favor of the correctness of the ruling of the court below, it being a well established rule of appellate procedure that where there is a conflict of evidence upon any material fact, the finding of the trial court will not be disturbed.

The trial court, after due hearing, entered its order enjoining the Rickey Land and Cattle Com-

pany from prosecuting its suits in the California Court, pending a final hearing and determination of the suit then pending before the United States Circuit Court, and the further order of that court; and it is from said order and decree that this appeal is taken by the Rickey Land and Cattle Company. (Trans. pgs. 58 and 60).

POINTS AND AUTHORITIES.

I.

All the questions involved in this case have been decided adversely to appellant by this court in the case of the Rickey Land and Cattle Company vs. Miller and Lux and the Rickey Land and Cattle Company against Wood (152 Fed. pgs. 11 and 19), as well as by the court below (146 Fed. 574), excepting possibly the single point, based upon the fact that appellees herein filed demurrers to the complaints in the California suits before they sought to obtain an injunction from the United States Court restraining the further prosecution of the California cases. This point, it is said, was not involved in the other cases, and it is argued that the filing of the demurrers in the California cases by appellees waived any objection by them to the jurisdiction of the California Court and gave that Court priority of jurisdiction as against the United States Court.

It may be conceded, for the purposes of this case, that the California Court had concurrent jurisdiction over the United States Court over the subject of the

action, and it may also be conceded that in such a case the rule is that the court first acquiring jurisdiction over the parties, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation without further interference from any other court. It may also be conceded, for the purposes of this argument, that all the parties to such litigation may by consent give one of the courts having such concurrent jurisdiction preference to the other and by submitting themselves to the jurisdiction of the court thus preferred estopped themselves from endeavoring afterward to transfer the litigation to the other court.

It must be borne in mind, however, that the parties had already submitted themselves to the jurisdiction of the United States Court and that the latter had acquired complete jurisdiction over both the subject matter of the action and the parties thereto long prior to the institution of the suits in the California Court. The suit by Miller and Lux against Thomas B. Rickey and the appellees herein was commenced in the United States Circuit Court June 10th, 1902. Rickey and all of the other parties to that suit had appeared, and the United States Court had obtained jurisdiction, long prior to the commencement of the Mono County suits (146 Fed. 584). Speaking with reference to this point, Judge Hawley said:

> "The fact that some of the cross-bills were not filed until after the service of process was made upon the parties in the Mono County suits is wholly immaterial. The jurisdiction in this court

does not in any manner depend upon the question as to the service of process in the Mono County suits. The only jurisdiction which this court is called upon to assert was obtained in the proceedings had in the suit of Miller and Lux v. Rickey et. al. (No. 731), which was long prior to the commencement of the Mono County suits, as will hereafter more fully appear."

After citing and quoting from many authorities Judge Hawley further said:

"The object and purpose of the Rickey Land and Cattle Company in the commencement in the suits in question in Mono County, Cal., is to take to another court the questions which have long been, and still are, properly in litigation in this court, and this is sought to be done in order to forestall and nullify, if possible, any decision or decree which this court may render regarding issues of which it first obtained full and complete jurisdiction. The impropriety and inadmissibility of such proceedings in the light of the established fundamental rules of our judicial system is manifest. The suits in this court will quiet and settle the title or rights of the respective parties to the flowing waters of Walker River. The enforcement of the rule that the court which first takes jurisdiction of the parties and subject matter if a suit must retain and exercise it to the exclusion of any and all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree is absolutely essential to the due and proper administration of justice. This duty it owes to itself, as well as to the litigants, in seeing that its own jurisdiction is not impaired. The litigants

have the right to have the case tried in the court where jurisdiction was first obtained, and should not be harassed or annoyed, or compelled to go to another court and there try the identical questions which will properly arise in the court where the suit was originally commenced and is still pending. Such a rule, properly applied, should be rigidly enforced, not only to prevent unseemly conflicts in the court, but to protect the litigants who are properly before this court."

So also this court said when the question came before it:

"As is apparent from the record, the Rickey Land and Cattle Company came into the property rights of Thomas B. Rickey after the suit to quiet title was begun in the Circuit Court for the District of Nevada, and after Rickey had answered therein, and the court had acquired full and complete jurisdiction, both over the subject matter of the suit and over the person of Rickey." (152 Fed. 21).

There then remains the single question whether the fact that certain of the appellees herein filed demurrers to the complaint in the California Court, before they applied to the United States Court for an injunction against further proceedings in the California court, estopped them from the right to apply for such an injunction.

The record in the case at bar shows that one of the grounds of the demurrer interposed by the appellees in the California court, was that the California court did not have jurisdiction. The record does not show,

however, whether the complaint in the California court made any reference to the case then pending in the United States Court. If the complaint in the California court set up sufficient facts to show that the subject matter of the action and the parties thereto, were already subject to the jurisdiction of the United States Court in a suit then pending before it, the lack of jurisdiction in the California court could have been raised by demurrer. If, however, the complaint in the California court was silent as to the case then pending in the United States Court, the question of jurisdiction could not be raised by demurrer. Because of the silence of the record in this respect the only presumption that can be indulged in is that the complaint in the California court did show the pendency of a case, involving the same issues, in the Federal Court, and the demurrers expressly reserved and raised an objection upon that ground.

The demurrers, therefore, did not waive any of the jurisdictional rights of appellees in the California court because, at the threshold of their entrance into that court, they protested against the court's jurisdiction.

If we cannot indulge in any presumption as to the allegations of the complaints in the California court, or if it be assumed that there was nothing in those complaints to show lack of jurisdiction, the question as to jurisdiction could not be raised by demurrer, but could only be raised by answer in the nature of a plea in abatement. Hence the filing of a demurrer,

even though it did not attempt to raise the question of jurisdiction, would not waive the right of the demurring defendant to plead the pendancy of the action in the Federal Court in abatement, when he filed his answer, as it is a self-evident proposition that a right, or privilege, cannot be waived by a failure to assert it until there has been first an opportunity to assert it. As is said in Abbott's Trial Brief (2d Ed.) Vol. 2, p. 976:

> "If a defect of jurisdiction appears upon the face of the complaint, it is generally taken advantage of by demurrer or motion. But when the want of jurisdiction is not thus apparent, the question may be raised by plea in abatement at common law, or by answer under the code procedure. In inferior courts, proof of want of jurisdiction is admissible under the general issue, but in other tribunals, the facts showing a defect of jurisdiction must be specially pleaded."

And again, in the same work, at p. 1199, it is said:

> "It is the better opinion that even in a court of general jurisdiction, while an unqualified appearance waives all objection to jurisdiction founded on the mode or place of service of summons, such objections, not appearing on the face of the complaint, may be taken by answer and are not under the new procedure, waived by being joined with defenses on the merits."

So in the case at bar, appellees would have had the right in the California court, if their demurrers were overruled, to plead the pendency of the case in

the Federal Court as a bar to the suits in the California court. Upon the filing of this plea the California court would doubtless have instructed appellees to call the Federal Court's attention to the matter, if they had not already done so, in order that the latter court might determine whether or not its jurisdiction had been infringed upon by the bringing of the action in the California court; because there is no common arbiter between the State and Federal courts, and comity between them becomes a necessity and becomes a law which cannot be disregarded, and when a Federal Court is first in possession of the subject of the litigation, it must be left to that court to determine when its possession and control of the property are ended, without interference from a State court. (Swinnerton vs. Ore. Pac. Ry., 123 Cal. 417).

Appellees, however, were not bound to wait until their demurrers were overruled and their pleas in abatement filed, before calling the Federal Court's attention to the trespass upon its jurisdiction. On the contrary, it was their duty to call the Federal Court's attention to the matter at the earliest opportunity. This they did—their rights, so far as the California cases were concerned, being protected in the meantime, by filing their demurrers, which was perfectly proper; for as was said in the National Steamship Company vs. Tubman, 106 U. S. 118, "they were not bound to desert the cases in the State Court and let their adversary take judgment by default against them" in that tribunal.

II.

Appellant's argument against the so-called "potential right" of the Federal Court to determine the matters in controversy between appellant and the appellees herein, arising under the latter's cross-bills, prior to the actual filing of the cross-bills and service of process thereon, is based upon the premise, as we understand it, that there cannot be any such thing as potential jurisdiction over any controversy until actual jurisdiction after suit is brought. This may be conceded in the terms stated, but the argument of appellant overlooks, first, the fact that long prior to the commencement of the California suits, the Federal Court had acquired complete jurisdiction of the subject matter and of the parties in the suit of Miller and Lux against Rickey and appellees herein: and, second, the fundamental principle that when a court of equity has once obtained jurisdiction of the subject matter and the parties, it has the power thereafter to do all things necessary to give full redress and render complete justice as between all parties, who are entitled to invoke such power thus existing in the court, by cross-bill, if necessary, against their co-defendants, as well as by an answer praying for affirmative relief against the complainant. The filing of a cross-bill in such a case is not the bringing of a new suit any more than the filing of an answer praying for affirmative relief. The cross-bill is simply ancillary to the suit in which it is filed and the jurisdiction of the court to maintain such a cross-

bill is dependent upon the jurisdiction of the court to maintain the original suit in which it is filed. (146 Fed. 584; 152 Fed. 18 and cases cited).

The argument of appellant, if correct, would give the Federal Court exclusive jurisdiction of all questions of fact and law arising upon the bill of complaint and the answers of the defendants in its court in the case at bar while the state court would have exclusive jurisdiction of all questions of facts and law arising upon the cross bills of defendants and the answers thereto, although all the parties were before both courts and the subject matter of the suits was the same in each court. In this, as in all similar litigation, the questions of law and facts arising upon the complaints, answers and cross-complaints are so interblended that it would be impossible to pass upon one without affecting the others, and the confusion and uncertainty that would result if two separate, independent tribunals should thus attempt to parcel out and settle the controversies involved in the present litigation would be intolerable, and emphasizes the necessity of enforcing in this case, as well as in all others, the rule for which we are contending.

The case of Rodgers, v. Pitt, 96 Fed. 668, cited in appellant's opening brief, does not aid appellant. In that case the action was commenced first in the State Court, but Judge Hawley said: "There is no pretense that the State Court ever acquired any jurisdiction over him (Rodgers) until long after the commencement of the suit and service of the process in this

court'' (p. 671), and in the same case Judge Hawley also said:

> . . there is need of but one trial and the parties should not be compelled to be and appear in both courts at the same time, and litigate substantially the same question. The proceedings in the one court or the other should be stayed at least, until the other has finally disposed of the suit befor it; and then, if any question remains to be disposed of, the other court might be called upon to decide it. Union Mut. Life Ins. Co. v. University of Chicago, (Fed. 443, 447; Foley v. Hartley, 72 Fed. 570, 574; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420; Hughes v. Green 28 C. C. A. 537, 84 Fed. 833, 835.''

The facts in Rodgers v. Pitt, supra, were much stronger in favor of the State Court's jurisdiction, than in the case at bar, but the right to maintain the action in the State Court was nevertheless denied. The quotation from Judge Hawley's opinion in appellant's brief is not applicable to the facts here. It would seem from Judge Hawley's opinion that all the parties in the Rodger case had submitted themselves, without objection, to the jurisdiction of his court, and made no objection thereafter until they obtained what they deemed an adverse ruling on the merits, and then endeavored to change the place of trial to the State Court. (p. 676); but aside from this, no lis pendens had been filed in the State Court, and this Court, upon appeal, held that Rodgers, who was a subsequent purchaser from one of the parties in the State Court, and who had no knowledge of the pen-

dency of the action, was not bound by the action in the State Court (Pitt v. Rodgers 104 Fed. 397). This, however, will not aid appellant here, as the latter is not an innocent purchaser from Rickey (146 Fed. 584; 152 Fed. 18); but even if it were, it was bound, under the doctrine of lis pendens, in the Federal Courts, from the time the process was served upon Rickey in the suit brought against him by Miller and Lux in the Federal Court (Bates Fed. Proc. Sec. 613; 146 Fed. 584; 152 Fed. 584).

Respectfully submitted,

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GEO. S. GREEN,

Solicitors for Appellees.